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SUBJECT: SOUTH AFRICA: FOREIGN MINING COMPANIES FILE

NOTICES RESERVING POSSIBLE LEGAL ACTION AGAINST GOVERNMENT

Classified By: Acting Econ Chief Alan Tousignant for reasons 1.4 (B, D)

1. (C) Summary. Four foreign mining companies filed notices on October 29 with the Department of Minerals and Energy stating their intent to pursue legal action for mineral rights potentially lost as a result of the implementation of the Mineral and Petroleum Resources Development Act on May 1, 2004. The move was prompted by the "Legal Proceedings Act," which gives the companies six months after a government action to file notice of a claim. The companies involved do not view the procedure as tantamount to filing a lawsuit, but rather as preserving their right to sue should the state decide not to transfer their "old order" mineral rights which were purchased from landowners to "new order" mineral rights administered by the government. Nevertheless, the action did not sit well with the Minister of Minerals and Energy, and some believe that the action may not have been legally necessary. End summary.

2. (U) Placer Dome (Canada), SouthernEra (Canada), Lonmin (U.K.), and Aquarius (Australia, but incorporated in Bermuda) filed notices on October 29 with the Department of Minerals and Energy stating their intent to pursue legal action for mineral rights potentially lost as a result of the implementation of the Mineral and Petroleum Resources Development Act on May 1, 2004. The companies involved do not view the procedure as tantamount to filing a lawsuit, but rather as preserving their right to sue should the state decide not to transfer their "old order" mineral rights which were purchased from landowners to "new order" mineral rights administered by the government. The Department of Minerals and Energy must transform "old order" rights into "new order" rights by 2009.

3. (U) The move by the four foreign mining companies was prompted by the Institution of Legal Proceedings Against Certain Organs of State Act of 2002, which states "that no legal proceedings for the recovery of debt may be instituted against an organ of state unless the creditor has given the organ of state in question notice in writing of its intention to institute the legal proceedings in question." Further, the creditor must serve a notice on the state within six months from the date on which a presumed debt became due. The Mineral and Petroleum Resources Development Act came into effect on May 1, 2004 -- six months ago. At issue for the companies is the prospect that the state will deny them "new order" rights because of their failure to meet Black Economic Empowerment (BEE) requirements as enumerated in the BEE mining charter and incorporated into the new Minerals Act.

4. (C) Sam Coetzer, Managing Director for Placer Dome/South Africa, explained to Econoff that he felt the company had little choice but to file the notice. Since 1999, the company invested \$500 million in South Deep, a gold mine with which it maintains a 50/50 joint venture with Western Areas. Placer Dome shareholders will not agree to sell shares to a BEE partner because it would mean relinquishing operational control, which under its current arrangement, Placer Dome retains. Its partner and original rights holder, Western Areas, also refuses to reduce its shareholding in this lucrative ultra deep mining venture. This automatically puts South Deep in contravention of the BEE mining charter because it does not have BEE partner. (Under the charter, companies are supposed to take on a 15% BEE partner by 2009 and a 26% BEE partner by 2014.) Placer Dome is worried that this could be the basis for the government to deny the joint venture "new order" rights. Despite many requests, it has not received assurances from the government that its investment in South Deep is secure.

5. (C) No South African based companies filed similar notices. According to Coetzer, Bobby Godsell, Chief Executive of AngloGold/Ashanti, argued at a Chamber of Mines meeting the previous week that a legal move under the Legal Proceedings Act was unnecessary. He believed that he could still sue the state under the law at a later date, if he had to, and that filing notice would only show a lack of trust in the government. "This is a government of dialogue," he reportedly argued. A Business Day editorial on November 2

also opposed the filings, arguing that since the loss, if it existed, would only occur in 2009, it was hard to see why the Legal Proceedings Act would apply now.

16. (SBU) The action by the foreign mining companies did not sit well with Minister of Minerals and Energy Phumzile Mlambo-Ngcuka, who reportedly told Placer Dome's Coetzer at a Chamber of Mines breakfast on November 2, "If it is a fight you want, then I'll show you how to fight." The next day, Business Day quoted Minerals and Energy Director General Sandile Nogxina saying, "I don't understand why they (the four foreign companies) think they could be exempted from the application of local law -- it's sheer arrogance." Mlambo-Ngcuka is expected to address the issue in the media soon.

FRAZER